Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ERIC SERRANO, *CHANHASSEN VILLAGER*, SOUTHWEST SUBURBAN PUBLISHING, AND RED WING PUBLISHING COMPANY,

Petitioners,

v.

TOM WORKMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION ~~PRESENTED~~

Do the costs of defense incurred in resisting Respondent's libel lawsuit threaten to deprive Petitioners (a small newspaper and its editor) of free speech rights guaranteed by the First Amendment, and if they do, then is an especially vigorous application required of established legal principles designed to protect these rights, including those directing that statements that are incapable of a defamatory meaning, or that are substantially true, cannot support a libel action?

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TREATISES AND OTHER MATERIAL

Dill, Barbara , "Libel Law Doesn't Work, but Can it be Fixed? At What Price?" *Libel Law and Freedom of the Press* 36 (1993) 9

Prosser, William L., *The Law of Torts* (4th ed.) 11

Restatement (Second) of Torts (1977) 11

Rotunda, Ronald E., and John E. Nowak, *Treatise on Constitutional Law* (2d ed. 1992) 9

Soloski, John, and Randall P. Bezanson, *Reforming Libel Law* 18 (1992) 9

RULE 29.1 LISTING

There are no parent companies or subsidiaries to be listed within the meaning of Rule 29.1.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

ERIC SERRANO, *CHANHASSEN VILLAGER*, SOUTHWEST SUBURBAN PUBLISHING, AND RED WING PUBLISHING COMPANY, Petitioners,

v.

TOM WORKMAN, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MINNESOTA

Eric Serrano, the *Chanhassen Villager*, Southwest Suburban Publishing, and Red Wing Publishing Company respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of the state of Minnesota in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App., *infra*, A–8) and the Carver County District Court (App., *infra*, A–38) are unreported.

JURISDICTION

The judgment of the Court of Appeals of Minnesota was filed on March 28, 2006 (App., *infra*, A–8). On May 24, 2006, the Supreme Court of Minnesota denied cross-petitions for review (App., *infra*, A–1). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

STATEMENT

A. A Single Editorial in a Weekly Newspaper

Respondent Tom Workman commenced this defamation action in Carver County District Court, Minnesota in April 2003. Workman is a prominent elected official in the southwest metropolitan area of the Twin Cities, having served on the Chanhassen city council, in the state House of Representatives, and on the Carver County Board. Petitioners are the *Chanhassen Villager* newspaper; former *Villager* editor Eric Serrano; Southwest Suburban Publishing (now Southwest Newspapers), which publishes the *Villager*; and Red Wing Publishing Company, Inc., which owns Southwest Newspapers The *Chanhassen Villager* is a small weekly newspaper with a circulation of approximately 6,000.

The trial court dismissed most of Respondent's defamation claims in an Order for partial summary judgment, but held that there were genuine issues of material fact regarding two discrete portions of an editorial entitled "The right foot?", published in the *Chanhassen Villager* on January 23, 2003. The editorial, which appeared on the newspaper's opinion page, read as follows:

> Like many other Carver County residents, we're still looking to make some sense out of last week's sudden dismissal of long-time county administrator Richard Stolz by the fresh panel of county commissioners.

We don't go so far as some residents in wondering whether the move was rooted in some ancient grudge between county officials and new County Commission Chair Tom Workman (the latter was sued by the former a few years back, and lost)—we like to think our elected officials are above such petty motives.

What we do worry about, however, is the manner in which the decision was made and whether or not it will become the common practice of this new panel of commissioners to reach consensus after discussing public business one-on-one out of the purview of the public. It's a practice that, if continued, will likely find these commissioners facing a challenge in a courtroom somewhere down the road—a course that would divert county resources which several commissioners contend are in short supply.

What is the difference between two commissioners discussing county business and one of those parties discussing the same business with another commissioner at a later date, and yet another commissioner days—if not hours—after that? In our mind there's not much.

Whatever his motives, as the leader of a group of basically fledgling commissioners, Mr. Workman, a former Chanhassen council man and a five-term state lawmaker, ought to know better and ought to be setting a better example. If he has a plan for the future of this county, better to expose it to the light of public

> discourse where it can be shaped with the assistance of those it will [a]ffect the most —the general public—than to give the plan an air of scheme and self-service.

The first of the two passages cited by the trial court appears in the second paragraph of the editorial, focusing on speculation about why the county board had suddenly terminated the long-time county administrator, Richard Stolz. The editorial writer wonders whether past actions by county officials involving Workman might have influenced the board's decision. The editorial then states parenthetically (and somewhat inaccurately) that "[Workman] was sued by [the county] a few years back, and lost." Only the "sued and lost" comment from this portion of the editorial was held to be potentially actionable in the trial court's summary judgment Order.

The second actionable passage in the editorial, according to the summary judgment ruling, was aimed a separate issue: not why the termination occurred, but how. It comprises most of the third paragraph of the editorial. Workman contended in his Complaint (and the trial court agreed) that these comments could be taken to imply that Workman had violated the state Open Meeting Law.

The *Villager* editorial was provoked by a meeting of the Carver County Board of Commissioners held the previous week (on January 14, 2003). At that meeting, the board decided to terminate the employment of Mr. Stolz, who for nearly 17 years had served as Carver County administrator —in effect, the chief executive of the county. Given Stolz' tenure and prominence, the decision would have been noteworthy under any circumstances. But the manner in which it was made invited even more attention, because the board had provided no prior public notice that such an action might be contemplated, and virtually no discussion occurred

at the meeting before the motion to terminate Stolz was approved.

The members of the county board who met on January 14 had just taken office in early January after having been elected in November, 2002. (Though some had been on the board before, Tom Workman was serving his first term in a county elective office.) The previous meeting was devoted mainly to organizational matters. Workman was elected chair of the new board. Nothing whatsoever came up during that meeting indicating that the board might be considering Stolz' termination. Similarly, the original agenda for the January 14 meeting contained no items referring to the status of the county administrator. However, on the day of the meeting, the chair (Workman) evidently added an agenda item relating to Stolz. Then at the meeting, Workman moved to end Stolz' tenure. After only perfunctory discussion by board members, the motion was approved.

This procedure left a considerable mystery for observers of the county board, including local news media. Why had the board suddenly decided to sack the county administrator? When had the issue become critical? How was it that a majority of the county board could, so far as appearances went, spontaneously agree with the motion to terminate Stolz, needing no deliberation to reach such an important decision? By any measure, it was a distinctly peculiar way of conducting such important public business, and it was this peculiarity to which editor Eric Serrano reacted when he wrote the editorial published in the *Chanhassen Villager* the following week.

Shortly after the editorial appeared, the newspaper was contacted by Workman's attorney, who demanded a retraction. In response, a retraction was published in the January 30, 2003 issue of the *Villager*, notifying readers that the

editorial had "incorrectly stated that Tom Workman was sued by Carver County and lost." The newspaper also apologized to Workman in the retraction.

B. Proceedings Below

Following commencement of this lawsuit, the parties conducted extensive discovery, after which Petitioners moved for summary judgment as to all of Workman's claims. The motion was heard on August 26, 2004. In a September 3, 2004 Order, the trial court granted the motion in part, dismissing Workman's defamation claims relating to three of the four articles identified in the Complaint. The court found that the claims were barred by the First Amendment; Workman did not appeal this ruling. As noted, however, the court held that factual questions existed requiring resolution by the jury with respect to "The right foot?" editorial.

The litigation eventually proceeded to trial on December 14, 2004. After hearing evidence, the jury received the case on December 21. The next day it returned a verdict in Workman's favor, awarding him $225,000 in damages for past injury to reputation and $200,000 for future damages. The trial court immediately convened a punitive damages phase of the trial. Following brief deliberations, the jury awarded Workman additional sums of $500 against Eric Serrano and $200,000 against Southwest Suburban Publishing. Altogether, the verdicts came to $625,500.

Petitioners subsequently served timely post-trial motions requesting judgment NOV, a new trial, or remittitur of the awards. These motions were heard on February 4, 2005. In an Order and Memorandum entered on March 3, 2005, the motions were denied in their entirety. On April 29, 2005, an appeal was filed. In an opinion filed on March 28, 2006, the Minnesota Court of Appeals determined that the judgment of

the trial court should be reversed, principally because the special verdict form used by the jury did not distinguish between a statement in the editorial that the appellate court held was actionable and one that it concluded was not. Ignoring Petitioners' argument that even the former statement was incapable of a defamatory meaning and was substantially true in any event, the court remanded the case for another trial.

In an Order filed May 24, 2006, the Minnesota Supreme Court denied the requests of both Petitioners and Respondent for review of the decision of the Court of Appeals.

REASONS FOR GRANTING THE PETITION

The Minnesota Court of Appeals agreed with Petitioners that the jury verdict was irreparably tainted as a matter of law, thus requiring reversal; however, the Court refused to disturb other key defamation law rulings made by the trial court. It therefore remanded the case for another trial.

Petitioners have already expended more than $200,000 in defending against this defamation action, and on remand could easily incur an additional $100,000. Petitioners submit that the patent disproportionality between the remaining substantive legal questions in the case and the enormous expense the litigation has imposed on them itself presents an issue of paramount importance under the First Amendment.

As this Court has recognized, such disproportionality poses a profound risk to expression sheltered by the First Amendment. "[E]rroneous statement[s] [are] inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (citation omitted). The overly aggressive "punishment of error runs the risk of inducing a cautious and

restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Certainly it would be better if falsehoods disseminated by the news media (and others) could be remedied without curtailing the flow of information to the public. But the complexity of modern defamation law and the daunting cost of litigation makes that a difficult balance to achieve. At minimum, it would therefore seem that the protections of the Constitution require an exacting scrutiny of libel claims and a rejection of those not clearly meritorious.

"[L]ibel suits are now brought against the press and broadcast media with greater and greater frequency." Ronald E. Rotunda and John E. Nowak, *Treatise on Constitutional Law*, §20.32 at 196 (2d ed. 1992). "Libel cases have also gotten to be very expensive. A newspaper or private individual who wins often finds victory is Pyrrhic because attorney's fees are debilitating." *Id.* In the face of defense costs that can reach into six or seven figures, even large news organizations are chilled. "Legal fees account for about 80% of the total cost of libel suits against the press." John Soloski and Randall P. Bezanson, *Reforming Libel Law* 18 (1992). "For many potential defendants, the most relevant source of the chilling effect is not the danger of losing a judgment but the prospect of having to pay the costs of defending." *Id.*

For smaller news organizations, such as the *Chanhassen Villager*, these costs are not simply chilling, but potentially ruinous.[1] "The big losers have been the smaller publishers

[1] A substantial portion of Petitioners' defense costs have been covered by a libel insurance policy in the present case. However, that is merely fortuitous. Many small news organizations do not have such coverage, nor do most private citizens. It is not hard to imagine the impact on them of a lawsuit like the instant one, where no one insurance existed to pay the defense costs.

and broadcasters, freelance writers, and citizen–activists, who are aware that they speak out on pain of being sued into bankruptcy, and the public, which has lost out on valuable information." Barbara Dill, "Libel Law Doesn't Work, but Can it be Fixed? At What Price?" *Libel Law and Freedom of the Press* 36 (1993).[2]

Here, Respondent's remaining libel claim cannot survive any sort of serious scrutiny, yet the Minnesota Court of Appeals rejected an outright dismissal, instead remanding the case for another trial. Petitioners should not be required to suffer the onerous additional expense of such a proceeding.

The newspaper editorial's claim that Mr. Workman was "sued and lost," lacking as it does any description of the circumstances, is simply not actionable in defamation. The common law long recognized that many kinds of remarks —even if offensive and false—could not, as a matter of law, be considered defamatory, and therefore could not satisfy plaintiff's obligation to demonstrate that they "tended to harm the plaintiff's reputation." Constitutional concerns developed as part of this Court's First Amendment jurisprudence have strengthened that recognition.

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[2] The Minnesota Supreme Court observed in one of its leading defamation opinions, "Even when they do survive [a defamation action], the threat of libel suits may render small newspapers ineffective as guardians of the public weal by deterring investigation of controversial subjects or even official misconduct." *Jadwin v Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 491 n. 19 (Minn. 1985). Cf. *Sassone v. Elder*, 626 So.2d 345, 351 (La. 1993): Without reasonably expeditious dismissal, "media defendants will be subjected by even the threat of unmeritorious actions to an inordinate amount of self-censorship, which could significantly infringe upon their constitutionally protected freedom."

A defamatory communication is elementally one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement (Second) of Torts* §559 (1977). "Defamation is . . . that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. It necessarily, however, involves the idea of disgrace." William L. Prosser, *The Law of Torts* (4th ed.), at 739. Thus the statement in question "must be more than unpleasant or offensive; the language must make the plaintiff appear odious, infamous or ridiculous." *Weyrich v. New Republic*, 235 F.3d 617, 627 (D.C. Cir. 2001).

The *Villager*'s editorial assertion that Workman was sued and lost cannot reasonably be interpreted as conveying a defamatory meaning. While not flattering, it hardly involves any notion of "disgrace," nor does it plausibly expose Workman to "public hatred, contempt, ridicule, or degradation." Especially because the editorial comment provides no details whatsoever about the nature of the purported legal action, it engenders no credible risk that a reader could conclude that Workman had committed any of the sorts of moral or legal wrongs typically associated with a valid defamation claim. People can be sued for many reasons having nothing to do with personal failings or disreputable behavior. For instance, a person who experiences serious medical problems may fall deeply into debt, be sued, and lose the suit purely on account of incapacity to pay. In another instance, an individual may resist an eminent domain proceeding. If unsuccessful, the challenger in such a case can be said to have been sued and lost, yet that would hardly constitute a defamatory accusation. In addition, even if the statement in question could be considered defamatory, it was substantially true, and thus not

actionable regardless. Workman's own brief to the Minnesota Court of Appeals demonstrated that there was little real difference between what the editorial said about previous legal troubles with the county and what actually happened. In the disputed parenthetical phrase, the *Villager* editorial stated (emphasis supplied), "We won't go so far as some residents in wondering whether the move was rooted in some ancient grudge between county officials and new County Commission Chair Tom Workman (*the latter was sued by the former a few years back, and lost*)—we like to think our elected officials are above such petty motives." However, Workman acknowledged that Carver County began an administrative penalty proceeding against the company for which at the time he was general manager, culminating in a fine imposed by the county board. Workman's company then "petitioned the court for a judicial review of the order" and overturned it, but on the sole ground that "the County was without authority to issue" its penalty order because it alleged violations of a state statute but not of any county ordinance. While the court rejected the county's authority to enforce the particular state statute, it found it unnecessary to review the merits of Carver County's determination that Workman's company was guilty of two violations of that statute. Thus the county and the company each initiated a proceeding against the other; the court action filed by Workman's company negated the effect of the proceeding that the county had commenced, but *solely* on jurisdictional grounds.

Workman has brushed off the question of whether the editorial was "substantially true" within the special legal meaning of that term. However, the very function of the "substantial truth" doctrine is to protect statements that are not literally true in every detail from the reach of defamation liability, if they produce essentially the same effect as the precise truth would have. "[M]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting

of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (quotation omitted). See also *Liberty Lobby v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988) ("where the question of truth or falsity is a close one, a court should err on the side of nonactionability").[3]

The uncontested facts show that Workman ran a company that was penalized after his own county concluded that the company had violated state law. Because that penalty was set aside solely on jurisdictional grounds, and because the *Villager* quickly retracted its mistake regarding the outcome of the proceeding and set the record straight, that discrepancy can hardly be the linchpin of an effort to sustain such a huge damage award.

This Court has observed that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times Co. v. Sullivan, supra*, 376 U.S. at 284, 286. Though offered in a slightly different context, the principle encompassed by the statement is no less vital here. Whatever protection for free expression the edifice of modern libel law may provide, it exists as little more than a mirage if small publishers and other speakers incur ruinous defense

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[3] Though emphasizing that the party to the county administrative proceeding was not Workman himself, but the company he ran, Workman makes no attempt to distinguish this case from another decision applying Minnesota defamation law, *Oaks Gallery and Country Store–Winona v. Lee Enterprises*, 613 N.W.2d 800, 802 (Minn. App. 2000), which affirmed summary judgment for the defendants in comparable circumstances.

costs when sued for libel. Unless appellate courts unconditionally reject all but the most clearly substantiated and meritorious libel claims, the burden of defense costs will overwhelm the abstractions of the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

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STATE OF MINNESOTA
IN SUPREME COURT

A05-834

Tom Workman,

Petitioner-Respondent,

vs.

Eric Serrano, et al.,

Respondents-Petitioners.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petitions of Tom Workman and Eric Serrano, et al., for further review be, and the same are, denied.

Dated: May 24, 2006

BY THE COURT:

s/ _____
Russell A. Anderson
Chief Justice

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners Eric Serrano, the *Chanhassen Villager*, Southwest Suburban Publishing, and Red Wing Publishing Company request Supreme Court review of the above-entitled decision of the Court of Appeals on the following grounds:

1. *Statement of Legal Issues and their Resolution by the Court of Appeals.*

a. Is the editorial comment that Respondent was "sued and lost" defamatory as a matter of law? If so, did Respondent present sufficient evidence demonstrating that the statement harmed his reputation? The Court of Appeals answered "yes" to both questions.

b. Are Petitioners Red Wing Publishing Company and Southwest Suburban Publishing properly subject to a punitive damage award, given the district court's pretrial rulings and the language of Minn. Stat. §549.20? The Court of Appeals held that they were.

2. *Statement of the Criteria of the Rule Relied upon to Support the Petition.* Petitioners rely on the criteria set out in Rule 117, subds. 2(a) and 2(d).

3. *Statement of the Case (Facts and Procedural History).*

Respondent Tom Workman commenced this libel action in Carver County District Court in April 2003. Respondent's political position (and that of his attorney) caused the judges sitting in Carver County to recuse themselves; the case was then assigned to retired Ramsey County District Court Judge John Connolly. Workman, a prominent elected official in the southwest metropolitan area, alleged that several items published by Petitioners defamed him. Pretrial motions eliminated all but one of those items from the case, a *Chanhassen Villager* editorial entitled "The right foot?". The editorial criticized Respondent in his

capacity as the new chairman of the Carver County Board, along with the manner in which the employment of the county's long-time administrator had been terminated. Two portions of the editorial were found actionable by the trial court: an incorrect assertion (promptly retracted) that Respondent had once been sued by Carver County and lost; and a longer passage expressing skepticism about the manner in which the decision involving the country administrator had been made.

The case was presented to a Carver County jury in December, 2004, which returned a verdict in Workman's favor, awarding him $425,000 in reputational damages, as well as punitive damages ($500 against Eric Serrano and $200,000 against Southwest Suburban Publishing–Red Wing Publishing Company), for a total of $625,500. After Respondents' post-trial motions were rejected, the instant appeal was filed. In an opinion dated March 28, 2006, the Court of Appeals found the section of the editorial criticizing the termination process to be protected speech, but because the special verdict form used by the jury (A–95) did not distinguish between the two separate portions of the editorial, the Court reversed the damage awards. At the same time, it affirmed some important legal rulings of the trial court.

Petitioner *Chanhassen Villager* is a small weekly newspaper with a circulation of approximately 6,000. Eric Serrano was its editor at the time the editorial in question was published. Red Wing Publishing Company owns the *Villager* through its Southwest Newspapers division (formerly Southwest Suburban Publishing).[1]

4. *Brief Argument in Support of the Petition.*

The Court of Appeals agreed with Petitioners that the jury verdict was irreparably tainted as a matter of law, thus requiring reversal; however, the Court refused to disturb other

[1] A more detailed factual and procedural summary of the litigation can be found at A–14.

key defamation law rulings made by the district court, which in Petitioners' view are erroneous. Some of them, even considered in isolation, present issues falling within the criteria of Rule 117. There is another issue, though—the patent disproportionality between the remaining substantive questions in the case and the withering expense of the litigation for Petitioners—which, while deriving from those listed above, transcends them.

As this Court has recognized many times, such disproportionality poses a profound risk to expression sheltered by the First Amendment. "[E]rroneous statement[s] [are] inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'," *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (citation omitted). The overly aggressive "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Certainly it would be better if falsehoods disseminated by the news media (and others) could be remedied without curtailing the flow of information to the public. But the complexity of defamation law and the daunting cost of litigation makes that a difficult balance to achieve. At minimum, it would seem that the protections of the Constitution require an exacting scrutiny of libel claims and a rejection of those not clearly meritorious.

"[L]ibel suits are now brought against the press and broadcast media with greater and greater frequency." Ronald E. Rotunda and John E. Nowak, *Treatise on Constitutional Law*, §20.32 at 196 (2d ed. 1992). "Libel cases have also gotten to be very expensive. A newspaper or private individual who wins often finds victory is Pyrrhic because attorney's fees are debilitating." *Id.* In the face of defense costs that can reach into six or seven figures, even large news organizations are chilled. "Legal fees account for about 80% of the total cost of libel suits against the press." John Soloski

and Randall P. Bezanson, *Reforming Libel Law* 18 (1992). "For many potential defendants, the most relevant source of the chilling effect is not the danger of losing a judgment but the prospect of having to pay the costs of defending." *Id.*

For smaller news organizations, these costs are not simply chilling, but potentially ruinous.[2] As this Court has observed, "[e]ven when they do survive [a defamation action], the threat of libel suits may render small newspapers ineffective as guardians of the public weal by deterring investigation of controversial subjects or even official misconduct." *Jadwin v Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 491 n. 19 (Minn. 1985). "The big losers have been the smaller publishers and broadcasters, freelance writers, and citizen–activists, who are aware that they speak out on pain of being sued into bankruptcy, and the public, which has lost out on valuable information." Barbara Dill, "Libel Law Doesn't Work, but Can it be Fixed? At What Price?" *Libel Law and Freedom of the Press* 36 (1993).[3]

Here, Respondent's remaining libel claim cannot survive any sort of real scrutiny, and Petitioners should therefore not be required to suffer the additional expense of another trial.[4] The newspaper editorial's claim that Mr. Workman was "sued and lost," lacking as it does any

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[2]A substantial portion of Petitioners' defense costs are covered by a libel insurance policy in the present case. However, that is merely fortuitous. Many small news organizations do not have such coverage, nor do most private citizens. It is not hard to imagine the impact them of a lawsuit like the instant one, where no one insurance existed to pay the defense costs.

[3]Cf. *Sassone v. Elder*, 626 So.2d 345, 351 (La. 1993): without reasonably expeditious dismissal, "media defendants will be subjected by even the threat of unmeritorious actions to an inordinate amount of self-censorship, which could significantly infringe upon their constitutionally protected freedom."

[4]To date, Respondents have incurred more than $200,000 in defense costs. See Affidavit of Mark R. Anfinson, A–1. An additional $100,000 could easily be needed to conduct another trial on remand. *Id.*

description of the circumstances, is simply not actionable in defamation as a matter of law. See, e.g., *Swanson v. First National Bank of Barnum*, 239 N.W. 900 (Minn. 1931) (erroneous reference to plaintiff in a mortgage foreclosure notice not actionable); *Ewing v. Cargill, Inc.*, 919 S.W.2d 507, 508 (Ark. 1996) (erroneous statement that defendant had judgment against plaintiff, without more, not "injurious"). Correspondingly, the evidence presented in this matter provides no support for the notion that the "sued and lost" statement caused harm to Mr. Workman's reputation. (See also A–37 to 39.)

Furthermore, the Court of Appeals' determination that Petitioner Southwest Suburban Publishing and its owner Red Wing Publishing Company are vicariously liable for punitive damages is wholly insupportable. The record shows incontestably that the jury never found that those Petitioners engaged in any of the conduct described by §549.20, subd. 2(c). Thus the Court of Appeals deferred to a "finding" that the jury never made. Punitive damage awards are an extraordinary remedy; they have a particular potential for chilling protected speech, and should therefore not be permitted except in circumstances that clearly satisfy the criteria of the statute. Moreover, such awards are relatively rare in libel litigation. Consequently, the decision below, though unpublished, has considerable potential for being construed in future defamation cases as allowing punitive damages against media organizations, in patent disregard of the statute. (See also A–52 to 55.)

For these reasons, Petitioners respectfully ask that their Petition for Review be granted.

DATED: April, 27, 2006

Respectfully submitted,

_____

Mark R. Anfinson (#2744)
Attorney for Petitioner

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2004).

STATE OF MINNESOTA
IN COURT OF APPEALS

A05-834

Tom Workman,
Respondent,

vs.

Eric Serrano, et al.,
Appellants.

Filed March 28, 2006
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Carver County District Court
File No. CV03579

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Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

STONEBURNER, Judge

Respondent in this defamation case obtained a favorable jury verdict awarding compensatory and punitive damages against appellants, who challenge the denial of their posttrial motion for judgment notwithstanding the verdict (JNOV) or a new trial. Appellants argue that respondent did not satisfy his pretrial burden of proving that statements in an editorial were capable of being defamatory; did not satisfy his burden at trial to prove falsity, actual malice, or injury to reputation; and, alternatively, that evidentiary errors, errors in jury instructions, and errors in the special-verdict form require a new trial. Because we conclude that one of the two statements that the district court found actionable was not defamatory as a matter of law, we reverse in part. Because we conclude that the evidence supports the jury's determination that the other statement was defamatory and made with actual malice, we affirm that portion of the verdict. But because the damages awarded related to both statements, we remand for a new trial on damages attributable only to the single defamatory statement in the editorial.

FACTS

Respondent Tom Workman is a former state legislator and current Carver County commissioner. Prior to being sworn in as a county commissioner, respondent talked separately to another newly elected board member and to a board member about the possible firing of Richard Stolz, who had been the Carver County administrator for 17 years. After respondent was sworn in and elected board chair, which occurred at the first meeting of the board, respondent spoke with Stolz and requested his resignation. Stolz, believing that respondent had the votes necessary to terminate his employment, agreed to resign and negotiated a severance agreement with the county. Shortly before the second board meeting, the agenda was amended to include approval of the termination agreement. There was very little discussion about

the termination of Stolz's employment at the meeting, and the commissioners voted 3-2 to accept the agreement.

Appellant Eric Serrano was the editor of appellant *Chanhassen Villager* (the *Villager)* at all times relevant to this lawsuit. The *Villager* is a weekly newspaper with a circulation of between 6,000 and 7,000, serving the cities of Chanhassen and Victoria. Appellant Southwest Publishing publishes and distributes the *Villager*. Southwest Publishing is a wholly owned division of appellant Red Wing Publishing.

On January 23, 2003, the *Villager* published an editorial written by Serrano entitled "The right foot?" The editorial was critical of respondent and the manner in which the decision to terminate Stolz's employment was made. The relevant portion of the editorial states:

We won't go so far as some residents in wondering whether the move was rooted in some ancient grudge between county officials and new County Commission Chair Tom Workman (the latter was sued by the former a few years back, and lost)—we like to think our elected officials are above such petty motives.[1]

What we do worry about, however, is the manner in which the decision was made and whether or not it will become the common practice of this new panel of commissioners to reach consensus after discussing public business one-on-one out of the purview of the public. It's a practice that, if continued, will likely find these commissioners facing a challenge in a courtroom somewhere down the road—a course that would divert county resources which several commissioners contend are in short supply.[2]

Respondent sued appellants, alleging that several items published by appellants, including the editorial, defamed him. Pretrial rulings limited respondent's claims to the two above-quoted statements from "The right foot?" Respondent asserted that the quoted paragraphs falsely insinuated that his participation in the board's decision to

dismiss the county administrator was motivated by the falsely asserted fact that respondent had, in the past, been sued by the county and lost, which caused him to have a petty grudge, which in turn led him to violate the Open Meeting Law to obtain consensus on termination of Stolz's employment.

The district court held that the statement that respondent had been sued and lost (sued-and-lost statement), which appellants admitted was false, and the statement about one-on-one meetings outside of county board meetings (decision-making statement), were capable of a defamatory meaning and respondent had met his pretrial burden of showing actual malice such that the statements should be submitted to the jury for a determination of whether the statements were, in fact, defamatory and made with actual malice. The district court also permitted respondent to amend his complaint to add a claim of punitive damages against Serrano. The district court did not grant appellant's motion to assert a claim of punitive damages against Serrano's employers, but held that the question of whether Serrano's employers authorized the editorial would be submitted to the jury.

The matter was tried to a jury over the span of seven days. The district court denied appellants' motion for a directed verdict at the close of respondent's case. The jury returned a special verdict finding that each statement was false, defamatory, and referred to respondent. The jury also found that the "statement or communication" (encompassing both the sued-and-lost and decision-making statements) was made by Serrano with actual malice. The jury awarded compensatory damages in the amount of $425,000. In a bifurcated proceeding on punitive damages, the jury found that Serrano acted with "deliberate disregard for the rights or safety of others" and that Southwest Publishing "authorize[d] . . . Serrano's act and how in fact it was done." The jury assessed punitive damages of $500 against Serrano and $200,000 against Southwest Publishing.

Appellants moved for JNOV, modified findings, a new trial, and/or remittitur. The district court denied the motions. This appeal followed.

DECISION

Generally, when JNOV has been denied by the district court, the denial must be affirmed on appellate review if "there is any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted). But appellants' primary argument is not based on the sufficiency of evidence at trial. Rather, appellants contend that the district court erred in the pretrial determinations that the sued-and-lost and decision-making statements, in the context of the editorial, could be defamatory and that respondent presented a jury question on actual damages. Appellants argue that the statements constitute fair comment, albeit critical, on government conduct, are not actionably false, and are protected by the First Amendment.

"[I]n cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 (1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 728-29 (1964)). The district court initially determines as a matter of law whether a statement is reasonably capable of carrying a defamatory meaning, and this determination is subject to de novo review. *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). Only if a statement is capable of carrying a defamatory meaning must the jury determine whether the statement is, in fact, defamatory. *Id.*

I. Pretrial determination of whether statements could be defamatory

Minnesota defamation law categorizes statements as (1) those that are defamatory on their face; (2) those that could not convey a defamatory meaning; and (3) those that are reasonably susceptible to a defamatory meaning as well as an innocent one. *Id.*(citing *Church of Scientology v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 155 (Minn. 1978)). A statement is defamatory "if it causes enough harm to a person's reputation to lower the community's estimation of the individual or to deter others from associating or dealing with the individual." *Weissman v. Sri Lanka Curry House*, 469 N.W.2d 471, 473 (Minn. App. 1991). Defamation requires that the plaintiff "prove that a statement was false, that it was communicated to someone besides the plaintiff, and that it tended to harm the plaintiff's reputation and to lower him in the estimation of the community." *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994). Additionally, when the plaintiff is a public official, the plaintiff must establish "clear and convincing proof of actual malice." *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 480 (Minn. 1985).[3]

Appellants first argue that respondent did not meet his burden of proving that the statements at issue are actionably false. *See Hunter v. Hartman*, 545 N.W.2d 699, 705 (Minn. App. 1996) (citing *Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 875 (1994), for the proposition that "only if 'no reasonable person could find' the allegedly defamatory statements 'supportable interpretations' of the situation being described are the statements actionable in defamation" and *Liberty Lobby v. Dow Jones & Co.*,838 F.2d 1287, 1292 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1998), for the proposition that "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability"), *review denied* (Minn. June 19, 1996)).

a. Sued-and-lost statement

Appellants admit that the sued-and-lost statement is "not precisely correct," but argue that because it produced no greater effect than the true description of the event would have, it was "substantially true" and therefore not actionable. "A statement is substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (quotation omitted); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S. Ct. 2419, 2433 (1991) ("minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting of the libelous charge be justified."(quotation omitted)).[4]

Appellants assert that the "sting" in this case came from the allegation that respondent was motivated by a petty grudge and that an error in the precise facts of how that grudge arose did not affect the gist of the allegation. We disagree. An accurate account of what occurred would not have cast respondent in the light of a public official who brought an unsuccessful lawsuit against the county. In fact, the county imposed penalties on a business of which respondent was general manager. The company challenged the penalties in district court, and the district court determined that the county was without jurisdiction to impose the penalties. The false statement consisted of more than "minor inaccuracies" and was capable of causing harm to respondent's reputation. The district court did not err in concluding that the sued-and-lost statement should be submitted to the jury.

b. Decision-making statement

Appellants argue that if respondent's claim regarding the decision-making statement is any type of defamation, it is "defamation by implication." Respondent, with whom the district court agreed, characterized the statement as

defamatory on its face, arguing that the language directly asserts that the manner in which the decision was made violated the Open Meeting Law. If the statement is defamatory by implication, appellants argue that in Minnesota a public official cannot allege a cause of action for a false implication based on true statements of fact. *See Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990) (arguably foreclosing public-official defamation actions that attempt to establish defamation through false implication from true statement) *cert. denied*, 498 U.S. 1119 (1991).

We agree with respondent and the district court that the decision-making statement is not defamation by implication, a term of art defined as occurring "when a defendant (1) juxtaposes a series of facts to imply a defamatory connection between them; or (2) creates a defamatory implication by omitting facts." *Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 498 (Minn. App. 2002), *see e.g. page 20 review dismissed* (Minn. Oct. 15, 2002). Furthermore, we agree with the district court that the decision-making statement contains a statement of fact. But with due respect to the district court's careful analysis of this issue, we conclude that the district court erred in setting out the fact stated.

The district court concluded that on its face, the decision-making statement is a statement that respondent violated the Open Meeting Law. The fact actually stated, however, is that the manner of making the decision about Stolz consisted of the "commissioners [reaching] consensus after discussing public business one-on-one out of the purview of the public." The decision-making statement does not mention the Open Meeting Law, does not accuse respondent of having violated the Open Meeting Law, and does not state that a legal action based on the manner in which the decision was made would be successful on any grounds.

Unlike the sued-and-lost statement, the fact asserted in

the decision-making statement is substantially true, given the context in which the statement was made. *See Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. App. 1991) (stating that context in which a statement is made is relevant in determining its falsity), *review denied* (Minn. Feb. 10, 1992). A news article that appeared in the *Villager* one week before the publication of the editorial covered the board meeting in which Stolz's employment-termination agreement was approved. The article attributed three statements to respondent relevant to the context in which the editorial was written. First, quoting respondent, the reporter wrote that the commissioners "individually had discussions" about Stolz. Second, paraphrasing respondent, the reporter wrote that respondent told the reporter after the meeting that Stolz's employment termination had not been discussed at a work session or a board meeting in 2003. Third, the reporter paraphrased respondent as saying that only current board members were involved in his discussions about Stolz's employment termination. We conclude that the underlying facts known to Serrano when he wrote the editorial (and not significantly contradicted at trial) support a determination of the substantial truth of the fact asserted in the decision-making statement.

After asserting as fact the manner in which the decision to terminate Stolz's employment was made, the decision-making statement warns or predicts that, if continued, this practice "will likely find the commissioners facing a challenge in a courtroom somewhere down the road—a course that would divert county resources." The assertion about what is "likely" to occur if this manner of decision making becomes a practice is a statement of opinion. Although opinions are not *per se* protected from being defamatory, a statement of opinion "which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 2706 (1990). Because it is

not possible to prove the truth or falsity of the prediction contained in the decision-making statement, the opinion is entitled to full constitutional protection and is not actionable as a matter of law. We therefore conclude that the district court erred in its pretrial determination that the decision-making statement is capable of defamatory meaning. The decision-making statement was erroneously submitted to the jury, and the district court erred in denying JNOV with regard to this statement.

II. Pretrial determination of fact question regarding actual malice

When the plaintiff is a public official, "an essential element of the plaintiff's claim is clear and convincing proof of actual malice." *Jadwin*, 367 N.W.2d at 480. "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685, 109 S. Ct. 2678, 2694 (1989). This court reviews de novo whether the record supports a finding of actual malice. *Diesen*, 455 N.W.2d at 453.

To show "actual malice," a plaintiff must demonstrate by clear and convincing evidence that the defendant made defamatory statements either (1) knowing that the statements were false or (2) while acting recklessly with regard to whether the statements were true. *N.Y. Times*, 376 U.S. at 279-80, 84 S. Ct. at 726; *see also Harte-Hanks*, 491 U.S. at 667, 109 S. Ct. at 2686 (stating that actual malice requires, at a minimum, that the statements were made with a reckless disregard for the truth). Clear and convincing evidence is more than a "preponderance of the evidence" and less than "beyond a reasonable doubt." *Bose Corp. v Consumers Union of U.S.*, 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

Because we have determined that the decision-making

statement was not defamatory as a matter of law, we do not reach the issue of actual malice with regard to that statement. Regarding the sued-and-lost statement, respondent asserts that appellant Serrano "deliberately disregarded warnings and inconsistencies between the verifiable facts" and the false statement that he made in the editorial, such that he acted recklessly with regard to the truth of the statement he made. Reckless conduct

> is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968). "[M]otives of diminishing plaintiff's credibility" do not establish actual malice where there is no evidence that the defendant had actual knowledge of falsity. *Fitzgerald v. Minn. Chiropractic Ass'n Inc.*, 294 N.W.2d 269, 271 (Minn. 1980); *see also Harte-Hanks*, 491 U.S. at 666 n.7, 109 S. Ct. at 2685 n.7 ("The phrase 'actual malice' . . . has nothing to do with bad motive or ill will.").

But a public official "is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive [for publishing] or [of accepted industrial standards] never bears any relation to the actual malice inquiry." *Harte-Hanks*, 491 U.S. at 668, 109 S. Ct. at 2686 (citations omitted). "Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is a different category." *Id.* at 692, 109 S. Ct. at 2698 (citation omitted). Recklessness may be found when there is reason to doubt the source's truth or when key witnesses and other sources of

information are purposefully ignored. *Id.* at 692-93, 109 S. Ct. at 2698-99. A "highly slanted perspective" may contribute to a finding of actual malice but cannot alone establish actual malice. *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003).

In this case, we conclude that the pretrial record before the district court was sufficient to raise a genuine issue of material fact and create a triable issue on the question of actual malice. The *Villager*'s reporter kept a file that contained articles she had written concerning the county's dispute with respondent's employer that was the basis of the sued-and-lost statement. Serrano testified in his deposition that he received and read this file the night before he wrote the editorial. The very week that Serrano became the editor of the *Villager*, the *Villager* ran a front-page story detailing the district court's reversal of the administrative-penalty order that the county had issued against respondent's employer. A later edition of the *Villager* published a letter to the editor from respondent stating that the county attorney "lost the [administrative-penalty order] case" and "had no authority to use the [administrative-penalty order] to enforce state laws." Serrano had spoken to respondent to verify authenticity of this letter before it was published, and he was responsible for reviewing, selecting, and editing all letters to the editor. Most significantly, in the same issue in which the "The right foot?" editorial appeared, a published letter from a citizen raised the issue of whether respondent acted out of a grudge, but speculated that the basis of such a grudge was the fact that "the county had charged the garbage company [respondent] was managing with improper handling of recyclables." Serrano selected this letter for publication and verified its authenticity with the citizen-author before he wrote the editorial. The district court correctly determined that with regard to the sued-and-lost statement, the issue of actual malice was for the jury.

III. Sufficiency of evidence to support verdict

"Unless the evidence is practically conclusive against the verdict, [this court] will not set the verdict aside." *Pouliot*, 582 N.W.2d at 224 (alteration in original) (quotation omitted). "The evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence." *Id.*

Appellants argue that respondent failed to establish, and the jury was not required to find, actual damage to respondent's reputation, one of the elements of defamation. The jury was instructed that

> [a] communication is defamatory if it tends to so harm the reputation of a person that it lowers his or her esteem in the community, or deter third persons from associating or dealing with him or her, or injured his or her character, or subjects this person to ridicule, contempt or distrust, or degrades or disgraces this person in the eyes of others.

The special-verdict form asked separately whether the decision-making and sued-and-lost statements were defamatory. Under the instruction quoted above, because the jury answered "yes" to the question about whether the sued-and-lost statement was defamatory, the jury must have concluded that the sued-and-lost statement harmed respondent's reputation.[5]

Respondent testified about the impact of the editorial on him. He specifically testified that, after the editorial, his constituents had the "general idea that [he] sued people" and that he was "generally up to something no good or being sued or suing people." Respondent's witnesses testified about respondent's reputation before and after the editorial. One witness testified that he often heard comments from community members about the editorial and that people he spoke to were always concerned about respondent's integrity,

motives, and leadership abilities. This evidence is sufficient to support the jury's finding that the sued-and-lost statement harmed respondent's reputation and was therefore defamatory.

The jury was further instructed that if it found that the statement was made with actual malice, it must presume respondent had been harmed and that no evidence of actual harm is required.[6] The special-verdict form, however, did not contain separate questions on actual malice for each statement and asked only whether Serrano made "the statement or communication" with actual malice. Because we have held that the decision-making statement was erroneously submitted to the jury, the failure to ask separate questions about actual malice is problematic. But as appellants noted in oral argument, evidence of actual malice was stronger concerning the sued-and-lost statement than concerning the decision-making statement. Based on our review of the record, which supports a conclusion that evidence of actual malice regarding the sued-and-lost statement is sufficient to support the jury's finding and is significantly stronger than evidence of actual malice regarding the decision-making statement, we determine that the jury's finding must relate at least in part to the sued-and-lost statement and a remand on this issue is not necessary.

But because the decision-making statement was erroneously submitted to the jury, the more problematic issue becomes the failure of the special-verdict form to have the jury specify what portion of respondent's damages specifically relate to the sued-and-lost statement. A significant portion of the evidence regarding damages related to the decision-making statement or the impact of the editorial as a whole, including negative statements and implications that did not constitute defamation. We conclude that a new trial on the issue of damages is required for a determination of the amount of damages related solely to the sued-and-lost statement and not to the decision-making statement or non-

defamatory portions of the editorial that may have damaged respondent's reputation.

IV. Punitive damages

Appellants argue that the punitive-damage award against Southwest Publishing should be reversed because respondent amended his complaint to include a claim for punitive damages against only Serrano. When no constitutional issue is raised as to the amount of punitive damages, this court's "review of an award of punitive damages is whether there was an abuse of discretion." *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 371 (Minn. App. 2003), *aff'd*, 684 N.W.2d 404 (Minn. 2004).

Although the district court did not grant respondent's motion to assert a claim against Southwest Publishing, it left to the jury the question of whether Southwest Publishing authorized Serrano's publication, implicitly leaving to the jury the issue of whether Southwest Publishing would be liable for punitive damages. Stipulated facts were read to the jury, including the fact that "Serrano was authorized to write editorials that were printed in the [*Villager*]." The jury found that Southwest Publishing authorized the publication by Serrano. Appellants argue that respondent failed to prove that Southwest Publishing knowingly authorized him to publish false and defamatory statements about respondent. But Minn. Stat. § 549.20, subd. 2 (2004), provides:

> Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:
>
> (a) the principal authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit, or
>
> (c) the agent was employed in a managerial capacity with authority to establish policy and

make planning level decisions for the principal and was acting in the scope of that employment, or

(d) The principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

In this case, there was an admission that Serrano, an agent of Southwest Publishing, was authorized to write editorials and evidence that Serrano managed the *Villager*'sreporters and staff. Serrano's direct supervisor testified that Serrano had final judgment over the work of the newspaper and was "charged to work independently as the gatekeeper for news that goes in the paper." Serrano was not required to submit editorials to his supervisor before publishing them. The record therefore contains sufficient evidence that Serrano was employed in a managerial capacity with authority to establish policy and make planning-level decisions for Southwest Publishing and was acting in the scope of that employment when he published the defamatory statement such that Southwest Publishing is liable for his act. *See Muehlstedt v. City of Lino Lakes*, 473 N.W.2d 892, 896 (Minn. App. 1991) (stating that "punitive damages can properly be awarded against an employer if the employee worked in a managerial capacity and acted in the scope of employment"), *review denied* (Minn. Sept. 25, 1991). The district court did not abuse its discretion by permitting the jury to award punitive damages against Southwest Publishing.

But regarding the amount of punitive damages, the award is no less problematic than the award of compensatory damages in that the punitive-damage award was based on an erroneous finding that the decision-making statement defamed respondent, and on arguments that implied that respondent could recover damages for harm caused by non-defamatory negative comment in the editorial. Therefore, we

reverse the amount of the punitive-damages award and remand for a redetermination of the amount based only on the sued-and-lost statement.

V. Evidentiary issues

a. Use of protected expression

Appellants argue that Workman used "other articles, editorials and publications that were beyond the reach of a defamation suit." Appellants do not indicate which "other articles, editorials and publications" were used, so it is assumed that appellants refer to trial exhibits of other articles concerning the county's dispute with respondent's employer and letters published by the *Villager*. But appellants cite no evidence or testimony that these publications were used to directly establish the elements of defamation. Instead, they were used mainly as evidence to prove that Serrano knew of the outcome of the county's dispute with respondent's employer and to support that he acted with actual malice in publishing the sued-and-lost statement. Appellants' argument, in effect, would preclude respondent from relying on anything but the editorial to prove his defamation case, a proposition not supported by case law. *See, e.g., Hunter*, 545 N.W.2d at 706 (discussing importance of context in defamation action). We conclude that the district court did not abuse its discretion in denying the request for a new trial on this ground.

b. Inadmissible hearsay and unfounded speculation

Appellants argue that the testimony establishing injury to respondent's reputation was "inadmissible hearsay or speculation." We have concluded that respondent submitted sufficient evidence to support the jury's finding that the sued-and-lost statement harmed respondent's reputation. Regarding the hearsay argument, appellants did not include any objection in their pretrial motion in limine and made no

hearsay objection at trial. *See Steiner v. Beaudry Oil & Serv., Inc.*, 545 N.W.2d 39, 44 (Minn. App. 1996) (stating that when a party fails to object to evidence at trial, that party has generally waived any objection), *review denied* (Minn. May 21, 1996). Appellants' claim is without merit.

c. Expert testimony

Appellants argue that the district court erred by permitting an expert witness to testify on respondent's behalf as to actual malice. They claim that "even an 'extreme departure from professional standards [is] insufficient'" to show actual malice. But respondent's expert witness did not testify regarding actual malice. Instead, the expert testified regarding the publication standards in the industry of journalism. The United States Supreme Court has stated that a public-figure plaintiff "must prove more than an extreme departure from professional standards" to establish actual motive. *Harte-Hanks*, 491 U.S. at 665, 109 S. Ct. at 2685. But appellants ignore the proposition that "[a]lthough courts must be careful not to place too much reliance on [accepted journalism standards], a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Id.* at 668, 109 S. Ct. at 2686. "[I]t cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Id.* The district court did not err in permitting testimony of the expert's opinion that the publication of the editorial violated journalistic standards.

Affirmed in part, reversed in part, and remanded.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] A letter to the editor that appeared contemporaneously

with the editorial, and which Serrano had read and edited prior to writing the editorial, stated "I wonder if the fact that the county had charged the garbage company [respondent] was managing with improper handling of recyclables, had anything to do with [respondent's] eagerness to replace Mr. Stolz."

[2] On January 23, 2003, the same day that the editorial was published, Workman's attorney served Serrano and his publisher with demands for retraction. Workman specifically challenged the sued-and-lost and decision-making statements, as well as a third statement in the editorial. In its next issue, the *Villager* printed a retraction, referring only to the sued-and-lost statement:

> [T]he editorial "Right foot?" incorrectly stated that Tom Workman was sued by Carver County and lost. Contrary to what the editorial stated, the county was involved in legal proceedings against AW Disposal, *not* Workman (the current Carver County Board chair.) Workman was employed as AW Disposal's general manager at the time, but was not an owner of the company. Furthermore–and also contrary to what the editorial stated–neither Workman nor AW Disposal lost any court action brought by the county.

[3] It is undisputed that respondent is a public official.

[4] Appellants also argue that under the "incremental-harm doctrine," which is closely related to the "substantial-truth doctrine," "small discrepancies" that do not add to the harm that protected speech causes to a defendant's reputation cannot support a defamation claim. Appellants cite *N.Y. Times*, 376 U.S. at 289, for the proposition that the ruling that small discrepancies were sufficient to injure respondent's

reputation may raise constitutional problems. But in *Masson*, the Supreme Court rejected "any suggestion that the incremental-harm doctrine is compelled as a matter of First Amendment protection for speech" and left it to the states to determine whether a defendant may argue that statements that do not result in any incremental harm can support a defamation claim. 501 U.S. at 523, 111 S. Ct. at 2436. The Minnesota Supreme Court, without specifically adopting the incremental-harm doctrine, indicated that the doctrine may apply. *See Carradine v. State*, 511 N.W.2d 733, 737 (Minn. 1994) (stating in connection with a remand that "if a jury properly might find that the additional statements significantly added to any injury sustained by the plaintiff over and above any injury sustained as a result of the absolutely privileged statements, then plaintiff should be allowed to proceed to trial . . .; otherwise not"). While we have concluded that the district court did not err in determining, as a matter of law, that the sued-and-lost statement should go to the jury on the issues of whether it defamed respondent and was made with actual malice, we leave it to the district court on remand to determine whether the sued-and-lost statement, read in the context of the entire editorial, created an injury that is too small to have contributed to any injury to respondent's reputation. *See, e.g., Masson*, 501 U.S. at 523, 111 S. Ct. at 2436 (noting that "state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm").

[5] We have previously criticized the practice of asking a jury to first determine whether statements were defamatory, because the question encompasses the entire cause of action and appears to subsume the questions on the remaining elements of defamation. *Schlieman*,637 N.W.2d at 306.

[6] Although appellants have challenged this jury instruction

on appeal, there is no record that the instruction was objected to, and we decline to address the issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued and considered in the district court).

STATE OF MINNESOTA
IN COURT OF APPEALS

Tom Workman, Respondent, v. Eric Serrano, Chanhassen Villager, Southwest Publishing Company, and Red Wing Publisher, Appellants.	STATEMENT OF THE CASE TRIAL COURT NO: cv-03-579 APPELLATE COURT NO:

1. Court or agency of case origination and name of presiding judge or hearing officer.

District Court for Carver County, The Honorable John S. Connolly, presiding.

2. Jurisdictional statement

(A) Appeal from district court.

Statute, rule or other authority authorizing appeal:

Minn. R. Civ. App. P. 103.03 (a) and (d).

Date of entry of judgment or date of service of notice of filing of order from which appeal is taken:

Post-trial motions of Appellants were denied and judgment was entered by the court on March 3, 2005, and Plaintiff served by facsimile and by mail a Notice of Filing of Order dated March 7, 2005.

Authority fixing time limit for filing notice of appeal (specify applicable rule or statute):

Minn. R. Civ. App. P. 104.01 subd. 1 and 2.

Date of filing any motion that tolls appeal time:

On January 21, 2005 Defendants timely served a Motion for Judgment N.O.V. and Modified Findings and Conclusions of Law, or New Trial, or Remittitur. (Verdicts were received and filed on December 22, 2004. On January 5, 2005, the District Court issued Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment, but ordered therein that entry of judgment be stayed for 30 days.)

Date of filing of order deciding tolling motion and date of service of notice of filing:

The post-trial motions were resolved in an order dated March 3, 2005 and Plaintiff served by facsimile and by mail a Notice of Filing of Order dated March 7, 2005.

(D) Finality of order or judgment.

Does the judgment or order to be reviewed dispose of all claims by and against all parties, including attorney fees? Yes (X) No ( )

3. State type of litigation and designate any statutes at issue.

Plaintiff filed a defamation suit against Defendants. While the First Amendment to the United States Constitution is involved, there are no statutes at issue.

4. Brief description of claims, defenses, issues litigated and result below. For criminal cases, specify whether conviction was for a misdemeanor, gross misdemeanor, or felony offense.

Plaintiff is a former legislator and current Carver County Commissioner, who sued a local newspaper, its editorial page editor, publisher, and other defendants in response to an editorial concerning the County Commission's removal of the County Administrator with little or no public discussion or deliberation. After summary judgment was granted for the defendants on some but not all of the

Plaintiffs' claims, and Plaintiffs' motion to amend to add a claim for punitive damages was granted in part and denied in part, the case was tried to a jury. Over the Defendants' objections, the jury decided whether two different portions of the challenged editorial constituted actionable defamation. The jury answered each portion of the special verdict form in favor of the Plaintiff, and awarded $225,000 in past damages and $200,000 in future damages. The court then convened a punitive damages phase of the trial. Following further deliberations, the jury answered each portion of the additional special verdict form in favor of the Plaintiff, and awarded $500 in punitive damages against the editorial page editor, Eric Serrano, and $200,000 in punitive damages against Defendant Southwest Publishing. Following post-trial motions filed by the Defendants (but not by the Plaintiffs), the trial court granted no relief to the Defendants, but granted the Plaintiffs' informal request to substitute Red Wing Publishing in place of Southwest Publishing as the entity liable for compensatory and punitive damages.

5. List specific issues proposed to be raised on appeal.

1. Whether Defendants were entitled to summary judgment, a directed verdict, or judgment notwithstanding the verdict, on each of Plaintiffs' claims.

2. Whether, in the alternative, Defendants were entitled to a new trial on each of Plaintiffs' claims.

3. Whether, in the alternative, Defendants were entitled to remittitur on each of Plaintiffs' claims.

4. Whether the District Court erred by granting Plaintiffs' informal request to enter judgment against Defendant Red Wing Publishing for claims that Plaintiff prosecuted against a different defendant,

and for which the jury verdicts were entered against that different defendant and not against Red Wing Publishing.

6. Related appeals.

List all prior or pending appeals arising from the same action as this appeal. If none, so state.

On December 9, 2004, in an action entitled *In re Eric Serrano, et. al, Serrano et al. v. Workman,* (Minn. Ct. App. File No. A04-2319), Defendants filed a petition for writ of prohibition challenging an interlocutory ruling permitting Plaintiff to conduct discovery against one of the defendants on issues related to its punitive damages claim even though the trial court had declined to grant Plaintiff permission to amend his complaint to seek punitive damages against that Defendant. In an order issued December 10, 2004, this Court declined to issue the writ.

List any known pending appeals in separate actions raising similar issues to this appeal. If none are known, so state.

None.

7. Contents of record.

Is a transcript necessary to review the issues on appeal? Yes (X) No ( )

If yes, full (X) or partial ( ) transcript?

Has the transcript already been delivered to the parties and filed with the trial court administrator? Yes ( ) No (X)

If not, has it been ordered from the court reporter? Yes (X) No ( )

8. Is oral argument requested? Yes (X) No ( )

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? Yes ( ) No (X)

9. Identify the type of brief to be filed.

Formal brief under Rule 128.02. (X)

10. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER OF COUNSEL FOR PLAINTIFF:

Julianne Ortman
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Ortman & Associates
1851 Lake Drive West, Suite 750
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(952) 448-9555

NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER, AND ATTORNEY REGISTRATION LICENSE NUMBER OF COUNSEL FOR DEFENDANTS:

Dated:
August 21, 2006

GREENE ESPEL, P.L.L.P.

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and

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(612) 827-5611

Attorneys for Appellants

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT

FIRST JUDICIAL DISTRICT
Case Type: Other Civil

Tom Workman, Plaintiff, v. Eric Serrano, Chanhassen Villager, Southwest Publishing Company, and Red Wing Publisher, Defendants.	Case No. CV-03-579 NOTICE OF APPEAL TO COURT OF APPEALS TRIAL COURT NO: cv-03-579 DATE OF JUDGMENT: MARCH 3, 2005

TO: Clerk of the Appellate Court
Minnesota Judicial Center
St. Paul, MN 55155

Please take notice that the above-named defendants appeal to the Court of Appeals of the State of Minnesota from judgment entered March 3, 2005 and all orders and prior judgments merged therein.

NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER OF COUNSEL FOR PLAINTIFF:

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NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER, AND ATTORNEY REGISTRATION LICENSE NUMBER OF COUNSEL FOR DEFENDANTS:

Dated:
April 29, 2005

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Attorneys for Defendants

State of Minnesota
Carver County

District Court
First District

Court File Number : 10-CV-03-579

Case Type: Civil Other/Misc.

Notice of Entry of Judgment

JULIANNE ELLEN ORTMAN
ORTMAN & ASSOCIATES PLC
1851 LAKE DRIVE WEST
SUITE 750
CHANHASSEN, MN 55317

In Re: TOM WORKMAN vs. JANE DOE, JOHN DOE, XYZ COMPANY, Eric Serrano, Mark Weber et al.

You are notified that judgment was entered on

Dated: March 3, 2005

Carolyn M. Renn
Court Administrator

By: s/_____
Deputy Court Administrator
Carver County District Court
604 East Fourth Street
Chaska, Minnesota 55318
952-361-1420

cc: Mark R. Anfinson
Julianne Ellen Ortman
Jane Doe
John Doe
Tom Workman
XYZ Company
Eric Serrano
Mark Weber
Chanhassen Villager

Chasaka Herald
Southwest Suburban Publishing
Red Wing Publishing Company
Paul R. Hannah
John Michael Baker

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Tom Workman,

Court File Number: 10-CV-03-579

Plaintiff,

vs.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND JUDGMENT

Eric Serrano, Mark Weber, Chanhassen Villager, Southwest Publishing Company, and Red Wing Publishing Co,

Defendants.

The above-entitled matter came on for trial before the Honorable John S. Connolly at the Carver County Judicial Center, Chaska, Minnesota, on 14th, 15th, 16th, 17th, 20th and 21st of 2004. The court heard a motion for judgment not withstanding the verdict, modified findings and conclusions, or new trial or remmittitur on February 4, 2005

Julianne Ellen Ortman, Attorney at Law, appeared with and on behalf of Plaintiff. Paul R. Hannah,John M. Baker and Mark R. Anfinson Attorneys at Law, appeared with and on behalf of Defendants.

Based upon all of the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. The parties stipulated the Chaska Herald was dismissed as a defendant from this lawsuit, and the Court accepts this stipulation.
2. The parties stipulated Eric Serrano and Mark Weber were agents of Defendant principle Southwest Publishing Company and the Court accepts this stipulation.
3. Plaintiff Tom Workman (hereinafter referred to as "Plaintiff Workman") is a resident of the city of Chanhassen, county of Carver, and state of Minnesota.

4. From July 2002 through November 5, 2002 Plaintiff Workman was a candidate for the elected position of Carver County Commissioner, District 2.
5. On November 5, 2003 Plaintiff Workman was elected to the Carver County Board of Commissioners and assumed the duties of this office on January 7, 2003.
6. Defendant Chanhassen Villager (hereinafter referred to as "The Villager") is an unincorporated business entity, which publishes a weekly newspaper (The ' Chanhassen Villager).
7. Defendant Chanhassen Villager's principal place of business is the city of Chanhassen, county of Carver, and state of Minnesota.
8. The Villager has a weekly print edition, circulated primarily in the cities of Chanhassen and Victoria, by sale at various retail locations and mailings to households. Published of the print version is on Thursdays.
9. The Villager has an online weekly at www.chanvillager.com, similar, if not identical to the print or paper version, which publishes on Wednesdays.
10. In early 2003 Defendant Eric Serrano (hereinafter referred to as "Defendant Serrano") held the position of editor at The Villager.
11. Defendant Serrano's duties as editor included responsibility for overseeing the content of items printed (and on-line) in the weekly editions of The Villager, supervision and assignment of staff reporter writers, and overseeing reporting and editorial policies.
12. Defendant Mark Weber hired Defendant Serrano and had supervisory authority over Defendant Serrano.
13. The Villager during relevant times relating to this action has been published by Defendants Mark Weber, Southwest Publishing.
14. Southwest Publishing, formerly known as Southwest Suburban. Publishing, is an unincorporated business

entity with it principal place of business in the city of Shakopee, county of Carver, state of Minnesota.

15. Southwestern Publishing Company was publisher and distributor of The Villager during the relevant time periods at issue in this case.
16. Defendant Mark Weber (hereinafter referred to as "Defendant Weber") is a resident of the city of Shakopee, county of Carver, and state of Minnesota.
17. Defendant Weber during all relevant times relating to this action acted as the publisher of The Villager, and as supervisor of Eric Serrano.
18. Sometime in January 1999, Carver County initiated Administrative Penalty Order proceedings against A W Disposal, Incorporated, which is a waste hauling company. A W .Disposal employed Plaintiff Workman as general manager.
19. On March 4, 1999 the Carver County Board of Commissioners approved an Administrative Penalty Order against A W Disposal, Incorporated. Following this action, A W Disposal Incorporated filed a Petition for Review in the First Judicial District, and by order dated January 14, 2000, summary judgment was granted in favor of A W Disposal.
20. An editorial titled The Right Foot appeared in The Villager, which commented about the dismissal of Carver County Administrator Richard Stolz at the second meeting of the Carver County Board with Plaintiff Workman as the Chairman.
21. The following statements were contained in the editorial The Right Foot, published on January 23, 2003 in The Villager, and authored by Eric Serrano:

    - "We won't go so far as some residents in wondering whether the move was rooted in some ancient grudge between county officials and new County Commission Chair Tom Workman (the latter was sued by the former a few years back, and lost) - we

like to think our elected officials are above such petty motives."

- "What we do worry about, however, is the manner in which the decision was made and whether or not it will become the common practice of this new panel of commissioners to reach consensus after discussing public business one-on-one out of the purview of the public. It's a practice that, if continued, will likely find these commissioners facing a challenge in a courtroom somewhere down the road – a course that would divert county resources which several commissioners contend are in short supply."

22. The Jury returned a Special Verdict in the above-captioned matter, answering the questions as follows:

We, the jury in this case, find as answers to the special verdict questions submitted to us as follows:

1. Was the following statement or communication by Defendants defamatory? *"We won't go so far as some residents in wondering whether the move was Rooted in some ancient grudge between county officials and new CountyCommission Chair Tom Workman* ***(the latter was sued by the former a few years back, and lost)*** *– we like to think our elected officials are above such petty motives."*

   Yes
   Yes or No

2. Was the following statement or communication by Defendants defamatory?
   "What we do worry about, however, is the manner in which the decision was made and whether or not it will become the common practice of this new panel of commissioners to reach consensus after discussing public

business one-on-one out of the purview of the public. It's a practice that, if continued, will likely find these commissioners facing a challenge in a courtroom somewhere down the road – a course that would divert county resources which several commissioners contend are in short supply."

Yes_____
Yes or No

3. Was the following statement or communication false? *"We won't go so far as some residents in wondering whether the move was Rooted in some ancient grudge between county officials and new County Commission Chair Tom Workman* ***(the latter was sued by the former a few years back, and lost)*** *– we like to think our elected officials are above such petty motives."*

Yes_____
Yes or No

4. Was the following statement or communication false? *"What we do worry about, however, is the manner in which the decision was made and whether or not it will become the common practice of this new panel of commissioners to reach consensus after discussing public business one-on-one out of the purview of the public. It's a practice that, if continued, will likely find these commissioners facing a challenge in a courtroom somewhere down the road – a course that would divert county resources which several commissioners contend are in short supply."*

Yes_____
Yes or No

If any of your answers above were "Yes," then answer this question:

5. Did the defamatory statement or statements you answered "Yes" to refer to Plaintiff?

Yes_____

Yes or No

If your answer to Question 5 was "Yes," then answer this question:

6. By clear and convincing evidence, was the statement or communication made by Eric Serrano with actual malice?

Yes

Yes or No

If your answer to Question 6 was "Yes", then answer the following questions:

7. What amount of money will fairly and adequately compensate Plaintiff for damages directly caused by the statement or communication, up to the time of this verdict, for:
   Past harm to his reputation, mental distress, humiliation, and embarrassment?

$225,000.00

8. What amount of money will fairly and adequately compensate Plaintiff for damages reasonably certain to occur in the future, directly caused by the statement or communication for:
   Future harm to his reputation, mental distress, humiliation, and embarrassment?

$200,000.000

Unanimous verdict (foreperson sign below & date)

_____

Jury Foreperson

Jury of Six Agree (then each please sign below & date):

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/

This verdict was agreed to at the hour of 10:00 a.m.
Date: 12/22/04

23. The Jury roturned Special Verdict #2 (Punitive Damages) and answered the questions on said form as follows:

We, the jury in this case, find as answers to the special verdict questions submitted to us as follows:

1.. By clear and convincing evidence, did Defendant Eric Serrano act with deliberate disregard for the rights or safety of others?

Yes
Yes or No

If your answer to Question No. 1 was "Yes," you must answer this Question:

2. Did Defendant Southwest Suburban authorize. Defendant Eric Serrano's act and how in fact it was done?

Yes
Yes or No

If your answer to. Question No. 1 was "Yes," then answer this Question:

3. What amount of money will serve to punish Defendant Eric Serrano and discourage others from behaving in a similar way?

$ 500.00

If your answers to Questions No. 1 and 2 were "Yes," then answer this Question:

4. What amount of money will serve to punish Defendant Southwest Publishing and discourage others from behaving in a similar way?

$200,000.00

Unanimous verdict (foreperson sign below & date)

_____

Jury Foreperson

Jury of Six Agree (then each please sign below & date):

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

This verdict was agreed to at the hour of 3:42

Date: 12/22/04

24. The Court accepts and adopts the Findings of Fact and Conclusions of the Jury. Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Plaintiff has sustained his burden of proving his case against Defendants.
2. Plaintiff has sustained his burden of proving punitive damages are appropriate in this case.
3. Plaintiff is entitled to judgment in this case, as set out by the jury in their special verdict forms.
4. Plaintiff is entitled to entry of judgment in the total amount of $ 425,500.00 against Defendant Eric Serrano, together with his costs and disbursements incurred herein.
5. Plaintiff is entitled to entry of judgment in the total amount of $ 625,000.00 against Defendant Southwest Publishing Company, and Red Wing Publishing Co, together with his costs and disbursements incurred

herein.

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:

1. Judgment shall be entered on behalf of Plaintiff in the amount of $ 425,500.00 against Defendant Eric Serrano, together with Plaintiffs costs and disbursements incurred herein.
2. Judgment shall be entered on behalf of Plaintiff in the amount of $625,000.00 against Defendant Southwest Publishing Company; and Red Wing Publishing Co. together with his costs and disbursements incurred herein.
3. Defendants shall pay to plaintiff's attorneys $700.00. within 60 days of this Amended Judgment, for the deposition of December 10, 2004 of an undisclosed witness per this court's order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 28, 2005 s/_____
John S. Connolly
Judge of District Court

JUDGMENT

I hereby certify that the above Findings of Fact, Conclusions of Law, and Order for Judgment constitutes the Judgment of this Court.

Date: 3-3-05 Carol Renn, Court Administrator

By: s/_____

Deputy Clerk

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

File No. 10-CV03-579

Tom Workman,

Plaintiff,

v.

ORDER

Eric Serrano, Mark Weber, The *Chanhassen Villager*, the *Chaska Herald*, Southwest Suburban Publishing, Red Wing Publishing Company, John Doe, Jane Doe, and XYZ Company,

Defendants.

The undersigned matter came on before the undersigned on November 10th, 2004 upon plaintiff s motion to amend his complaint seeking punitive damages. Julianne E. Ortman appeared for the Plaintiff. Mark R. Anfinson and Paul Hannah appeared for the defendants.

The Court orally granted plaintiff s motion to amend for punitive damages as to the defendant Erica Serrano. Both counsels have asked for a clarification of the Court s order. The question before the Court now is whether or not there is a question of fact to be decided by the jury if and when the jury considers the question of punitive damages.as to whether or not the defendants, The *Chanhassen Villager* and the *Chaska Herald*, Southwest Suburban Publishing, and Red Wing Publishing Company as the employers of Defendant Eric Serrano are vicariously liable for any punitive damages

assessed against Eric Serrano.

Based upon the materials submitted by the respective attorneys, and their arguments, IT IS HEREBT ORDERED THAT::

1. Plaintiff is allowed to amend his complaint to seeking punitive damages only as to Eric Serrano.

2. The question of whether defendant Eric Serrano's employers authorized the publication and the manner of the Right Foot editorial shall be submitted to the jury in the form of an interrogatory (See CIVJIG 94.92) along with an instruction pursuant to CIVJIG (94.15).

3. The plaintiff may discover from the defendant's employers their financial wherewithal in order to support plaintiff s claim for punitive damages. (See CIVJIG 94.10)

Date: 30 November 2004

_____

John S. Connolly
Judge of District Court.
First Judicial District